Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

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No. 87-1085

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1987

FAITH CHRISTIAN FELLOWSHIP INTERNATIONAL, INC.,
FAITH CHRISTIAN FELLOWSHIP OF MILWAUKEE, INC.,
a/k/a WORD ALIVE CHRISTIAN FELLOWSHIP,
a Wisconsin religious corporation,

Petitioner,

v.

BOARD OF ZONING APPEALS OF THE CITY OF MILWAUKEE,
a Wisconsin quasi-judicial municipal body,
and CITY OF MILWAUKEE,
a Wisconsin municipality,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The central issue in this matter is whether the courts below were required to apply strict scrutiny in reviewing the action of the Zoning Board. All argument must be grounded in this issue. As Petitioner argued to the Courts below, Snyder v. Waukesha County Zoning Board, 74 Wis. 2d 468, 247 NW 2d 98 (1976), is not dispositive of this case. Snyder did not deal with the application of a zoning ordinance in a First Amendment setting, it merely established a procedural framework for review. The standard of review is the substance to be applied within that framework. The lesser standard was applied in Snyder not because it is appropriate in all cases, but because there was no reason to apply any other standard.

Although Respondent attempts to minimize the impact of its decision, the record demonstrates its decision affects the ability

of Petitioner's members to engage in meaningful worship. The decision effectively bans Petitioner from the entire business district adjacent to its membership. The record further reveals the decision was targeted expressly at store-front churches such as Petitioner. Moreover, Petitioner is not attempting to establish a pattern of discrimination. Nor is Petitioner attempting to argue that it is unconstitutional in all cases to regulate or ban churches from business districts. However, excluding this church from this area of Spanish-speaking people was discriminatory and creates a substantial burden on their ability to freely exercise their religion.

Respondent cites several cases in support of its proposition that strict scrutiny need not have been applied in this case. However, a close review of South Side Move of God Church v. Zoning Board of Appeals, 47 Ill. App. 3d 723, 365 NE 2d 118 (Ct. App. 1977), reveals that the court did

apply strict scrutiny. "We agree that different presumptions become operative when zoning ordinances are applied in situations involving the constitutional guarantees of freedom of religion." Id. at 122, citing Columbus Park Congregation v. Board of Appeals, 25 Ill. 2d 65, 182 NE 2d 722 (1962). The court recognized that under Columbus Park, it was required to apply strict scrutiny to review the board's action. However, in South Side, the petitioner had failed to make the requisite showing to be entitled to the permit, even when applying this higher standard of review. The court accurately analyzed the Columbus Park decision. In that case, the court found the application of the zoning provision to the petitioner unconstitutional as violative of both due process and freedom of religion. Id. at 726. The court rejected the arguments presented to the board to deny the permit, and thereby found the denial arbitrary and capricious. Although rendered prior to the

decisions of Sherbert v. Werner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1971), the decision in Columbus Park contains language which indicates an intent to apply strict scrutiny, and the court in South Side so found. Columbus Park at 725. The result in Hope Deliverance Center v. Zoning Board of Appeals, 116 Ill. App. 3d 868, 452 NE 2d 630 (Ct. App. 1983), is not inconsistent with the strict scrutiny applied in South Side. In Hope the court never reached the constitutional issue, since it rejected all evidence in opposition to the petition as unreasonable and inappropriate as a matter of law, and concluded that the board's decision was arbitrary and capricious without needing to address the standard of review to be applied. In this case, Petitioner demonstrated in its initial brief to the Wisconsin Court of Appeals that the reasons in the record for opposing the petition were equally inappropriate and insufficient; however, the inadequacy of the

evidence in opposition is apparent only upon applying the proper standard, giving deference to Petitioner's First Amendment rights, rather than to the regulatory agency.

Although Respondent contends that the state courts considered and rejected Petitioner's constitutional argument, a review of the orders of said courts, along with the briefs presented by Petitioner, reveals that the state courts did not consider the constitutional argument of Petitioner at all. Although raised and argued before the trial court, the question regarding the unconstitutional application of the ordinance is hardly mentioned in the Circuit Court decision. Moreover, after full briefing of the application issue to the Wisconsin Court of Appeals, the matter was summarily sustained on the erroneous ground that Petitioner had relinquished its constitutional argument, even though this issue was extensively briefed. When this error was raised in the Petition for Review

to the Wisconsin Supreme Court, that Court declined to accept certiorari. As a result, no court has reviewed the substantial question of whether the Board applied its zoning ordinance in an unconstitutional way in violation of Petitioner's First Amendment rights.

CONCLUSION

In that the courts below have erroneously failed to apply the standard of strict scrutiny to review the action of Respondent, and said action in denying Petitioner a special use permit was an unconstitutional application of that ordinance, the Petition for Writ of Certiorari should be granted. Otherwise, this unconstitutional action will go unreviewed. This issue is one of national scope, and should be resolved by the United States Supreme Court.

Dated this 3rd day of February, 1988.

Respectfully submitted,

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Attorneys for Petitioner

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John J. McLario, Jr.
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-and-

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